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David Weirens
Minnesota Board of Water and Soil Resources
520 Lafayette Road
St. Paul, Minnesota 55155

RE: Minnesota Wetland Conservation Act
BWSR Agency Proposals (October 14, 2014)

Dear Mr. Weirens:

The comments below are submitted on behalf of WaterLegacy, a statewide Minnesota non-profit organization with over 10,000 members concerned about protecting Minnesota's water resources and the communities that rely on them.

WaterLegacy appreciates the effort you and your staff have made to provide us with information, although we were not included in the Minnesota Wetlands Conservation Act (WCA) stakeholder process. We believe that changes are needed in order to better protect and restore wetlands and that some of these changes may require amendments of statutes and rules.

WaterLegacy intends to provide more detailed comments on what changes we would recommend once we have had more time to review the statutes, rules and proposals reflected in the Board of Water and Soil Resources ("BWSR") staff document entitled "Potential Implementation of Stakeholder Priorities" ("BWSR Staff Proposal"). At this time, we would emphasize our perceptions about the process, summarize our concerns about the problems sought to be solved and make some preliminary comments about the proposed solutions reflected in the BWSR Staff Proposal. We hope to be able to suggest draft language at a later date.

1. The scope of non-governmental organization stakeholder inclusion was insufficient. The materials prepared by BWSR and the discussions in the stakeholder meetings suggest that a critical aspect of the problem sought to be addressed is to ensure that there is appropriate mitigation for wetlands in Bank Service Area ("BSA") 1 and BSA 2, located in northeastern Minnesota and that the need for this mitigation is not exported to serve economic convenience and create poorly-conceived wetlands projects in other counties. We believe that non-governmental organizations focused on protecting water resources in northeastern Minnesota should have been expressly solicited to participate in this process, rather than excluded from the stakeholder group.
2. Problems and potential solutions should have been developed in consultation with tribal governments before beginning a "stakeholder" process. Tribal governments are not "stakeholders" in the sense that mining interests or conservation advocates might be. Tribes are governmental managers of natural resources and parties that have treaty rights that may be impacted by wetland destruction in northeastern Minnesota and policies that require or

circumvent in-watershed mitigation of this destruction. WaterLegacy would recommend that further development of legislative or rulemaking proposals be deferred for at least several months to allow this government-to-government consultation to take place.

3. The “prioritization” process employed by BWSR staff was flawed and confusing. We’ve talked with staff and stakeholders who confirm that participants were told to identify an issue as a “priority,” if they felt the issue was important, whether they wished to advance the proposal or to ensure that it would never be implemented. The resulting controversy and confusion does not reflect a consensus on priorities. It reflects a profound division between interests that seek to make wetlands destruction in northeastern Minnesota easier and those who believe that current statutes, rules and enforcement are insufficient to protect these vital resources.
4. The primary problem with wetlands mitigation in Minnesota is failure to apply statutes and rules to avoid wetlands destruction and prioritize in-watershed wetlands mitigation. We perceive the problems reflected in Koochiching and Aitkin Counties as legitimate concerns. But we believe that this problem has been caused by regulators’ reluctance to require mining facilities to provide high quality in-watershed mitigation for wetlands and stream destruction. We believe that options to solve this problem of consistency and rigor in WCA implementation should be the highest priority for statutory and rule change. If the problem is related to agency structure, the best policy solution may be to transfer wetland mitigation functions related to mining from the Minnesota Department of Natural Resources (“MDNR”) to BWSR. If information gaps are critical, the best policy solution may be to support a more detailed and granular inventory of wetlands mitigation options in northeastern Minnesota.
5. The “Alternative Options for Compensatory Mitigation within NE Minnesota Watersheds” in the BWSR Staff Proposal would neither protect wetlands nor wetland functions. The most significant concerns we have with this “starter” language are that all “aquatic resources” are deemed to be equivalent to wetlands and that “preserving” uplands buffers near these resources would provide credit applicable for destruction of wetlands. Wetlands provide some functions, such as mercury and carbon sequestration, that no other water resources can provide. Restoration of impaired waters is legally required and should not rely on wetlands destruction for implementation.

5.1 Any alternative options for compensatory mitigation for wetlands in BSA 1 must only be available for wetlands credits if the alternative is completely within BSA 1.

5.2 Alternative options for compensatory mitigation for BSA 1 wetlands must be scientifically demonstrated to replace wetlands functions. Even then, alternative replacement should be limited to 10% of the mitigation. This limit recognizes limits on scientific knowledge as well as limits on the ability to replicate wetlands functions.

5.3 Technical evaluation teams should be used to evaluate whether there are wetlands replacement options in BSA 1 that have been overlooked or improperly rejected and whether a proposed alternative mitigates the loss of functions resulting from the project’s destruction and impairment of wetlands. The roles reflected in the proposed new language for Minn. R. 8420.0526, Subp. 9 depart from statutory goals. Determining whether uplands have a positive effect on functions of *some* aquatic resource does not mitigate project impacts on *wetlands*.

5.4 No replacement credits should be allowed for preservation of restoration of uplands that are not immediately adjacent to replacement wetlands. Minn. Stat. 103G.2242, subd. 12(c)(2); Minn. R. 8420.0526, Subp. 2. The changes proposed in new language for Minn. R. 8420.0526 are inappropriately broad.

5.5 The conservation easement statute (Minn. Stat. 103G.2251) should use the words “demonstrable threat” rather than creating new less definite language, and should not add a broader definition of replacement credits. This statute should be clarified to provide that a conservation easement may only qualify for wetlands preservation credit if there are no reserved rights to minerals on the land where the easement is located.

5.6 Restoration of streams may be an appropriate alternative for mitigation credit, if the criteria identified above are met: mitigation within BSA 1, technical team functional analysis, not more than 10% of credit.

5.7 Providing credit for restoring the quality of a degraded wetland (BWSR proposed text for Minn. R. 8420.0526, Subp. 4) should require technical determination that the proposed restoration would significantly improve wetlands function and that such an improvement will be maintained for at least one hundred years. Even then, credits for this type of restoration should be limited to no more than 10% of total credits.

6. The “Wetland Mitigation Siting” proposed by staff creates unnecessary weakness in wetlands protection, while addressing legitimate concerns about poor quality wetlands projects resulting from exporting wetlands replacement in BSA 1 to other counties.

6.1 BWSR’s proposal to sunset the 1:1 wetlands replacement ratio between BSA 1 and BSA 2 is scientifically sound and should be implemented.

6.2 The concept of tiered replacement out-of-watershed deserves closer attention. However, concept of equivalency between in-watershed replacement in BSA 1 and wetlands mitigation in a “priority” area is completely unacceptable. Tiering should be reviewed to provide the following: (1) retain the first three steps encouraging proximate wetlands replacement; (2) allow statewide replacement only with a very significant disincentive ratio; (3) provide an exception to this substantial credit disincentive for export of wetlands mitigation (which exception should still be at least 1:1.5), where a technical panel has determined that the particular wetland to be restored is a high priority, that the specific restoration project proposed will have significant statewide benefit, and that there is some reasonable relationship between the wetlands impacted and the nature of out-of-watershed priority restoration proposed. A limit to the percentage allowed for *any* out-of-watershed credit should be considered as well. Statutory direction for rulemaking should refer to creating disincentives for export of mitigation out-of-watershed to low priority areas.

6.3 Defer consideration of any in-lieu wetlands fee credits as explained in Section 7 below.

6.4 Avoid new language that dilutes the concept of wetlands replacement, such as “offset” or “actions that provide” in Minn. Stat. 103G.222. “Alternative” mitigation should not be allowed out-of-watershed under any circumstance.

6.5 In general, staff proposed language is needlessly complex if the purpose is to provide a disincentive for statewide export of wetlands mitigation to low priority areas.

7. An “In-Lieu Fee Program” for large-scale wetlands mitigation of destruction in northeastern Minnesota is premature and would not protect wetlands. Given Minnesota’s current implementation practices, there are no models of large-scale high quality in-watershed mitigation and no way to reasonably estimate costs for replacement of peatlands and bogs. Creating an in lieu fee program would serve to remove responsibility from project proponents and is likely to result in a poorly-funded “race to the bottom,” facilitating low quality and/or out-of-watershed mitigation.

7.1 No in-lieu fee program should be developed in statute or rule at this time.

7.2 Statutory changes that would facilitate BWSR’s capacity to develop and administer wetland credit banks for up-front mitigation should be considered.

8. The BWSR Staff Proposal for “Wetlands Mitigation Search Criteria” funding of additional research to identify wetland mitigation sites in northeastern Minnesota has merit. Funding should support an independent wetlands inventory identifying priority restorations in northeastern Minnesota and both possible and available mitigation sites. This independent assessment should include a component of public participation to propose and validate sites as well as tribal consultation, should be accessible and usable in the permit process, and should allow for ongoing updates and revisions.
9. The “WCA and Clean Water Act Section 404 Consistency” section of BWSR Staff Proposal appears overly focused on seeking exemptions from state WCA process review. The policy objectives of WCA consistency with federal law require further explanation. Proposals should also focus on ways to achieve greater consistency in WCA application throughout the State, including the potential to consolidate wetlands replacement functions related to mining projects in BWSR.

Once again, WaterLegacy appreciates the opportunity to comment on proposed WCA policy changes and the efforts that BWSR has made to inform organizations that were not included in the original WCA stakeholder process. Please feel free to contact me at 651-646-8890 if you have any questions regarding these comments.

Sincerely yours,



Paula Goodman Maccabee
Advocacy Director/Counsel for WaterLegacy